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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 659

FRANK ROSS, *Petitioner*,

v.

F. E. STANLEY, ET AL., *Respondents*.

BRIEF IN OPPOSITION

TO

PETITION FOR CERTIORARI

in behalf of

F. E. Stanley, W. J. Bowen, Harold A. Martin, and O. Paul Herzig, four of the Respondents.

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NOVEMBER 10, 1965.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI in behalf of F. E. Stanley, W. J. Bowen, Harold A. Martin, and O. Paul Herzig, four of the Respondents.

This Brief in Opposition to Petition for Certiorari by Frank Ross, Petitioner (Plaintiff in District Court, and Appellant in Court of Appeals, Fifth Circuit), is filed by the four individual Respondents named above.

POSITION OF THESE RESPONDENTS

Our position is that the Petition for Certiorari should not be granted, for the following reasons, viz:

1. No showing has been made by the said Petition sufficient to call for an exercise by the Supreme Court of its sound judicial discretion involved in the granting of any Petition for Certiorari.

2. There is no special nor important reason for granting a review on Writ of Certiorari, nor any need therefor, such as are delineated in Rule 19(b).

3. There is no federal question involved in the order of dismissal entered by the District Judge on Sept. 30, 1963 (Printed Record in Court of Appeals, hereafter denominated R. —, pages 127-133), nor in the affirmance thereof by the Court of Appeals, Fifth Circuit, *Ross* v. *Stanley* (June 1, 1965, Rehearing Denied July 13, 1965), 346 F. 2d 645-654.

4. The only issue decided by the District Court, affirmed by the Court of Appeals, was that the Second Amended Complaint be dismissed. No decision was rendered by either the District Court or the Court of Appeals against the Defendants-Appellees (Respondents herein), and therefore no occasion for any Respondent to seek review of an adverse ruling by the District Court or by the Court of Appeals.

5. The only determination or decision of the Court of Appeals, Fifth Circuit, was: "we hold that the entire lawsuit is barred by the statute of limitations" (346 F. 2d 646 text), and therefore that Court's conclusion: "The judgment of the trial court to the extent that it dismissed the claim as being barred by the statute of limitations" (346 F. 2d 650 text) was proper.

The only limitations involved were those of the State of Florida about which there is no contrary view by either Court below nor by any party hereto.

6. There is nothing novel, precedent shattering, or precedent setting that (a) the established rule that in a diversity action in District Court the limitations to be applied are those of the State, nor (b) that a Court of Appeals should affirm a dismissal or other final judgment that is correct under the law, even though on a different ground in part than assigned by the trial court.

NATURE OF CASE—JURISDICTION

This was a stockholder's derivative action brought in the U. S. District Court, Middle District of Florida, by Frank Ross, the owner of 117 of some 25,000 shares common stock of Florida Gas Company, a Florida corporation, against the latter, and Florida Gas Transmission Company (a wholly owned subsidiary under laws of Delaware), the directors of both companies at various dates, and four contracting and engineering firms, claiming alleged tortious conduct by the directors and the contractors (in whom some directors had an interest) in connection with the execution of contracts in November 1958 for building the Louisiana-Florida part of a Texas to Florida gas pipeline for Florida Gas Transmission Co.

It is a diversity suit, the only basis claimed for U. S. District Court jurisdiction being: "The jurisdiction of the Court is based on diversity of citizenship and jurisdictional amount" (Second Amended Complaint, R. 44)—To same effect, see also Petition for Certiorari, page 2.

PROCEEDINGS—BASIS OF DECISIONS

Suit was instituted by complaint filed Aug. 3, 1962 (R. 15). The Second Amended Complaint was filed Feb. 6, 1963 (R. 44). To that, all defendants (who were served with process) filed Motions to Dismiss (R. 82, 119, 120, 122, 125). Those motions to dismiss challenged the complaint "on a number of grounds" (R. 127). After extensive argument and memorandum briefs, the District Court did not rule on the merits of any claimed cause of action, nor on many of the other points advanced by the defendants. The District Court found that the motions to dismiss should be granted, the order stating:

> Since the plaintiff cannot recover on either of the grounds of recovery set out in the second amended complaint, it is the opinion of the Court that the motions to dismiss should be granted. (R. 132)

Because of the order of dismissal, the District Court felt it was not necessary to rule, either for or against the defendants, on other points raised—he saying that, by the dismissal they were "rendered moot and do not require a ruling by the Court." (R. 133)

> Note: The opinion and order of dismissal by the District Court is not attached to the Petition for Certiorari; but it appears in the Printed Record in the Court of Appeals, pages 127-133, filed in this Court.

The Petitioner's Notice of Appeal (R. 134) to the Court of Appeals from the District Court, stated that he "appeals"—

> from the final order and judgment herein dated and entered September 30, 1963, dismissing this cause as to the Defendants named therein and

> from each and every part of such order and judgment, except that Plaintiff does not appeal from so much thereof as dismisses this cause as to Defendant Barnard & Burk, a partnership, and as to the Defendant, Constructors of Florida, Inc.

These Respondents (as four of appellees) before the Court of Appeals, contended that "the Order of Dismissal should be affirmed, not only for the reasons properly assigned by the District Court, but also for other reasons" (Our Brief, p. 70). There were two main questions involved on the appeal, viz: (1) "whether the District Court erroneously or correctly ruled that the cause of action, if any, attempted to be alleged in the Second Amended Complaint, is barred by the three-year Florida statute of limitations;" and (2) "whether the final judgment of dismissal also is correct on any ground other than that assigned by the District Judge" (Our Brief p. 8).[1]

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[1] There were many matters presented to the District Judge, and to the Court of Appeals for affirmance of the Dismissal—Limitations barring any clause of action—No cause of action stated—Letter agreements in 1954 with contracting firms for construction at "a cost no higher than an arm's length contract for similar work under similar circumstances"—Full disclosure of planned contracts and method of construction, costs, detailed relationship of contractors and Florida Gas Transmission, approved in 1956 in certificate proceeding by Federal Power Commission, Opinion No. 301, 16 FPC 118-151, affirmed in Florida Economic Advis. Council v. Federal Power Commission (CA-DC), 251 F. 2d 643, cert. den. 5/19/58, 356 U.S. 959, 2 L. ed. 2d 1066, 78 S. Ct. 996—Petitioner's (appellant's) admission (Br. p. 54) that "the complaint here does not allege that Transmission agreed to pay more (construction contracts of Nov. 1958) than the value of the services it was to receive. The service contracts as such were, therefore, not damaging to Transmission"—Failure to comply with Rule 23(b)—Jurisdiction and venue problems—Complete irrelevancy of subsequent proceedings before Federal Power Commission with respect to ac-

The Court of Appeals did not rule on the contentions as to the merits, either of Plaintiff or of Defendants, but affirmed the Order of Dismissal, saying:

> This is an appeal from an order of the district court dismissing this shareholder's derivative action which the trial court considered to have alleged two separate claims, one for damages and the other for unjust enrichment. The court dismissed the former claim on the ground that it was barred by the Florida three-year statute of limitations and it dismissed the latter claim on the ground that it was prematurely in court. Whether or not this conceptual bisection of the complaint is too finical a refinement, it can avail the appellant nothing. Regardless of the number of claims which may have been stated, we hold that the entire lawsuit is barred by the statute of limitations. (346 F.2d 646 text).

AFFIRMANCE ON APPEAL

An appeal lies only to an adverse judgment, not to the ground or reason assigned by the trial Court therefor. If one party appeals, then the successful litigant below may support the decision in his favor not only on the ground or reason given by the trial Court but also on any other legal ground or reason which supports the judgment from which the adverse party has appealed.

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counting, none of parties herein (except only Florida Gas Transmission Co.) being parties to those proceedings before FPC whose administrative rulings or decisions do not create private rights; and those subsequent proceedings, Opinions 431 of 6/8/64, 431-A of 8/5/64, and 431-B of 10/2/64, being now under review by Court of Appeals, Fifth Circuit—etc. It is obvious, of course, that the matters relating to the merits (other than the grounds specifically stated therein) were not ruled on by the District Court or by the Court of Appeals, Fifth Circuit, in 346 F. 2d 645.

In this case, the Petitioner as Appellant against whom the judgment or order of dismissal had been entered appealed to the Court of Appeals from that—

> final order and judgment * * * dismissing this cause * * * and from each and every part of such order and judgment (R. 134).

The Appellees (Respondents here) properly urged all "matters appearing in the record in support of a judgment".[2, 3]

The argumentative statement of Petitioner (Petition p. 19) that "in the absence of a cross-appeal, the rule * * * forbids an appellate court to modify the lower court's decision to the detriment of the appellant" is much too broad and does not apply to an affirmance on a different ground than that assigned by the Court below. The cases cited by Petitioner (p. 20) relate to situations only where no cross-appeal was taken to an adverse ruling. It is significant here that there was no ruling by the District Court adverse to Defendants—the District Court did not rule that limitations did not bar the entire action. The Court of Appeals did so rule, and therefore properly sustained the Defendants-Appellees' position with respect there-

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[2] Quotation from *Letulle* v. *Scofield* 1940, 308 U.S. 415, 84 L. ed. 355, 360. To same effect, appellees cited: *Kam Koon Wan* v. *E. E. Black Ltd.*, 9 Cir. 1961, 188 F. 2d 558, 563; *Ginsberg* v. *Black*, 7 Cir. 1956, 237 F. 2d 790, 792, cert. den. 77 S. Ct. 669, 353 U.S. 911, 1 L. ed. 2d 665, rehear. den. 78 S. Ct. 776, 356 U.S. 948, 2 L. ed. 2d 822.

[3] "It is a rule applicable to appeals in criminal as well as civil cases that 'a successful party in the District Court may sustain its judgment on any ground that finds support in the record.'" *United States* v. *Meyer*, CA 5 1959, 266 F. 2d 747, cert. den. 80 S. Ct. 138, 361 U.S. 875, 4 L. ed. 2d 113.

to and properly affirmed the judgment of Dismissal with all legal incidents to that affirmance. See Footnote[4] as to cases cited by Petitioner.

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[4] Cases cited by Petition, page 20 thereof:

(a) *Letulle* v. *Scofield* (1940), 308 U.S. 415, 84 L. ed. 355. This Court found it unnecessary to consider petitioner's contentions that Court of Appeals erred in deciding case on a ground not raised by pleadings, etc., because "the petitioner cannot complain, as the judgment must be affirmed" on a different ground, saying: "a respondent or an appellee may urge any matter appearing in the record in support of a judgment." This Court did not increase the judgment over the amount found due by the Court of Appeals, as respondent had not there filed a cross-appeal; and ruled:

> "The judgment of the Circuit Court of Appeals is affirmed and the cause is remanded to the District Court with directions to proceed in accordance with the opinion and mandate of the Circuit Court of Appeals."

(b) *Helvering* v. *Pfeiffer* (1937), 302 U.S. 247, 251, 82 L. ed. 231, applies the rule to a decision of the Board of Tax Appeals,— "while a decision below may be sustained, without a cross-appeal, although it was rested upon a wrong ground, see Helvering v. Gowron, an appellee cannot without a cross-appeal attack a judgment below."—In *Helvering* v. *Gowron* (1937), 302 U.S. 238, 245, 82 L. ed. 224, 230: "In the review of judicial proceedings, the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

(c) In *Zelinger* v. *Uvalde Rock Asphalt Co.* (Cir. 10—1963), 316 F. 2d 47, "after directing a verdict for Uvalde, * * * the trial court granted Zelinger's motion to reduce the judgment * * * Uvalde did not cross-appeal from the court's action on this motion, and consequently the judgment in this respect became final."

(d) *Canter* v. *American Insurance Co.* (1830), 3 Pet. 307, 7 L. ed. 688, held that "the question of damages is not open before this Court," because the lower court's decree was "a virtual denial of damages," which adverse decree was final, unless appealed from.

(e) *Schildhauer* v. *Moe* (Cir. 2 1963), 319 F. 2d 587, where injunction was granted with condition that certain defense should not be later asserted; Court held reversal of decree was not proper

LIMITATIONS—NOT A FEDERAL QUESTION

This is a stockholder's derivative action, filed in Federal court only because of diversity of citizenship.

In the 1957 decisions in *Swanson* v. *Traer,* 354 U.S. 114, 1 L. ed. 2d 1221, 77 S. Ct. 116, and the companion case of *Smith* v. *Sperling,* 354 U.S. 91 (text 95), 1 L. ed. 2d 1205 (text 1210), 77 S. Ct. 1112, 68 ALR 2d 805, it was said:

> Since our decision in Erie R. Co. v. Thompkins, 304 U.S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 ALR 1487, the law which governs the merits in these derivative actions is local law.

Even prior to the *Erie* decision, it was the long established rule that Federal courts applied State statutes as construed by the State court, where, as here, the limitation on cause of action is not governed by a fed-

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on contention of appellee, who had not filed cross-appeal. Condition was eliminated, and as so modified was affirmed.

(f) *Tallman* v. *Udall* (Cir.-D.C., 1963), 324 F. 2d 411, did not review ruling of District Court on statute of limitations which had been passed upon therein "adversely to the appellee." In a footnote, that was distinguished with the following language: "The Railway Express case appears to have involved a situation where the lower court did not in fact decide or pass upon the ground sought to be raised on appeal. In this situation the successful litigant may well be able to renew the point on appeal as a basis of affirmance."

(g) *Morley Construction Co.* v. *Maryland Casualty Co.* (1937), 300 U.S. 185, 81 L. ed. 593, held that "the relief remodeled and adapted to the new law and the new facts" ("the facts being found anew and differently") could not be decreed on review, in the absence of a cross appeal. However, "without a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.' "

eral statute.[5] Nor since the *Erie* decision in 1938, has there been any different rule except a more binding one to the same effect, viz: the State law as to right of action and limitations applies in stockholder's derivative actions.

Thus, in *Guaranty Trust Co.* v. *York* (1945), 326 U.S. 99, 65 S. Ct. 1464, 89 L. ed. 2079, a diversity case applying state law including state limitations, it was said that a federal court "cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State. * * * if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery." Mr. Justice Frankfurter emphasized the rule in the following words:

> The source of substantive rights enforced by a Federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity. (326 U.S. 112 text, 89 L. ed. 2088 text).[6]

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[5] *Bell* v. *Morrison* (1828), 1 Pet. 351, 360, 7 L. ed. 174, 178; *Teague R.R.* v. *Blossburg & Corning R.R.* (1873), 20 Wall. 137, 22 L. ed. 331; *Bouserman* v. *Blunt* (1893), 147 U.S. 647, 13 S. Ct. 466, 37 L. ed. 316; *Campbell* v. *Haverhill* (1895), 155 U.S. 610, 15 S. Ct. 217, 39 L. ed. 280.

[6] See also *Ragan* v. *Merchants Transfer & Warehouse Co.* (1949), 337 U.S. 530, 69 S. Ct. 1233, 93 L. ed. 1520; and *Wells* v. *Simonds Abrasive Co.* (1953), 345 U.S. 514, 73 S. Ct. 856, 97 L. ed. 124.

There has been no dispute about the fact that the applicable limitations here is the Florida three-year statute; and it appears plain that the Court of Appeals (346 F. 2d 645) correctly applied the law of the Florida state courts on this issue.

NO RIGHT TO INITIAL DECISION BY SUPREME COURT

No original jurisdiction is vested in this Court to review and interpret the Natural Gas Act, in the way the individual Petitioner desires.

As has been pointed out, and as affirmatively and fully shown by the Record, neither the Petitioner nor the Respondents have had any adverse decision as to any individual rights under the Natural Gas Act or the Federal Power Act or even under any opinion of the Federal Power Commission. Indeed, neither the District Court nor the Court of Appeals made any ruling thereon. Both the District Court and Court of Appeals' decisions relate to dismissal of plaintiff's action —the District Court ruling the dismissal was proper on either theory of plaintiff, one theory of tortious conduct being barred by limitations, and the other theory of unjust enrichment to accrue possibly in the future upon the finality of a Federal Power Commission decision, if rendered in a certain way, being premature;—and the Court of Appeals affirming the dismissal because the entire case was barred by limitations.

It is not perceived how the Federal Power Act, 16 USC 824g, cited by Petitioner, can be involved. No party to this case is in anywise doing any act, and has not done any act, subject to that statute. It simply has no bearing—but the basic point here is that no interpretation or ruling thereon can be found in either Court's ruling in this case.

Also, the only Natural Gas company in this case is Florida Gas Transmission Co. (former name: Houston Texas Gas and Oil Corporation), a Delaware corporation, to whom the certificate of public convenience and necessity to construct and operate the Louisiana to Florida portion of the gas pipeline (Texas to Florida) was issued by Federal Power Commission on Dec. 28, 1956, Opinion No. 301, 16 FPC 118. No ruling thereon was made by the District Court or by the Court of Appeals herein.

Nor is any party in this case, except Florida Gas Transmission Co., a party to the subsequent proceedings mentioned by Petitioner, in which Opinion 431 (June 8, 1964), 431-A (August 5, 1964), and 431-B (October 2, 1964) were rendered subsequent to the Judgment of Dismissal herein by the District Court. Judicial Review of those three 1964 Federal Power Commission opinions is now in progress in the U. S. Court of Appeals, Fifth Circuit.[7]

The entire Petition for Certiorari, pages 10 to 19, purportedly setting forth "Reasons for Granting the Writ," is under sub-headings:

(p. 10) "1. Petitioner's claims are an essential ingredient of the regulatory scheme of the Natural Gas Act and the Federal Power Act."

(p. 13) "2. The decision below effectively defeats the policy of the Natural Gas Act and the Federal Power Act * * *."

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[7] Petition for Certiorari (page 7 note) states:

"Petitions to review these decisions are pending in the Court below."

Also, Opinion No. 301 was involved in *Florida Economic Advis. Council* v. *Federal Power Commission* (CA-DC 1958), 251 F. 2d 643, cert. den. 5/19/58, 356 U.S. 959, 2 L. ed. 2d 1066, 78 S. Ct. 996.

Those assertions, it is respectfully submitted, are capricious, and are not supported by the Record or any portion of it.

Furthermore, no such decision or ruling has been made by the Court of Appeals herein (or the District Court).

Neither is there any merit or substance to Petitioner's contention, (p. 13): "2. The decision below * * * misapplies Florida state law." Specific Florida Statute and specific decisions of Florida state courts are cited in the opinion of the Court of Appeals and support the conclusion that the cause of action, or causes of action, if any, set forth in the Second Amended Complaint are barred by the Florida limitations, and that the District Court's judgment of Dismissal properly was affirmed.

CONCLUSION

It is respectfully submitted that no valid reason exists for the exercise of the discretion by this Court involved in the granting of any petition for certiorari, and that the petition herein should be denied.

Respectfully submitted,

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